SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

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NO. **1601**

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MAX LIPKIN, Petitioner

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA,
ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA, Respondents.

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# PETITION FOR A WRIT OF CERTIORARI
# TO THE COURT OF APPEAL
# OF THE STATE OF CALIFORNIA,
# FIRST APPELLATE DISTRICT

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PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA,
FIRST APPELLATE DISTRICT

---

Petitioner, Max Lipkin, prays that a Writ of Certiorari issue to review the order of the Alcoholic Beverage Control Appeals Board of the State of California hereinafter, Appeals Board , entered in the above-entitled case (Appeals Board No. 54266) on December 30, 1970, and regarding which a Petition for Writ of Review was denied by the Court of Appeal of the State of California, First Appellate District (Civ. No. 29375) on February 3, 1971,

and regarding which a Petition for Hearing was denied by the Supreme Court of the State of California (Civ. No. 29375) on March 9, 1971.

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## OPINIONS OF THE DEPARTMENT, THE APPEALS BOARD, AND THE COURTS BELOW

This case involves an administrative action revoking Petitioner's on-sale general license issued by the Respondent Department of Alcoholic Beverage Control of the State of California [hereinafter, Department]. The action was initiated by an accusation filed by Respondent Department on May 22, 1969. Petitioner requested a hearing as provided by California Gov. Code §11506. [Hereinafter, unless specified otherwise, all statutory sections refer to the applicable codes of the State of California]. At the hearing of November 4, 1969, before the Department, Respondent Department sought revocation of Petitioner's license on grounds that the continuance of the license would be contrary to the public welfare and morals within the meaning of Article XX, §22 of the State Constitution. In support of these grounds, the Department, in two counts, alleged violations of B.& P. Code §§2420.5(b), 25657, Pen. Code §303(a), and Admin. Code Title IV, Rule 143. On stipulated facts, the Department ordered revocation of Petitioner's license (Department File No. 54266, Reg. 8274) on April 30, 1970.

Petitioner appealed from the order revoking his on-sale general license. On December 30, 1970, the Appeals Board sustained the Department's order revoking Petitioner's license (Appeals Board No. 3446). A copy of the decision and opinion is set forth in the Appendix to this petition, infra.

Thereafter Petitioner filed a Petition for Writ of

Review in the Court of Appeal of the State of California which was denied (Lipkin v. Dept. Alcoholic Bev. Control, et al., Civ. No. 29375, Cal. App. 3rd ___ (February 3, 1971)) and a Petition for Hearing in the Supreme Court of the State of California which was denied (Lipkin v. Dept. Alcoholic Bev. Control, et al., Civ. No. 29375, ___ Cal. 3rd ___ (March 9, 1971)).

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## JURISDICTION

The order of Respondent Appeals Board was entered on December 30, 1970. The Petition for Writ of Review was denied on February 3, 1971, by the Court of Appeal of the State of California, First Appellate District. The Petition for Hearing was denied on March 9, 1971, by the Supreme Court of the State of California. No rehearing was either sought or granted. The jurisdiction of this Court to review the present case on Petition for Certiorari rests upon 28 U.S.C. §1257(3).

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## QUESTIONS PRESENTED

The overriding issue involved herein relates to Petitioner's right to due process of law in administrative proceedings under the Fourteenth Amendment to the Federal Constitution. At stake is the Petitioner's occupation from which he derives his livelihood.

Petitioner respectfully asks this Honorable Court to determine whether certain circumstances, procedures, and rules surrounding the proceedings below deprived him of due process of law.

Specifically, the questions presented for review

by this Court are:

I. Whether a stipulation, entered into because of counsel's gross mistake of law, prevents a full and fair hearing as required by due process of law, where, because of that stipulation, counsel made no cross-examination of an opposing witness, called no further witnesses, offered no evidence by way of defense, and made no statement by way of mitigation?

II. Whether a hearing officer has an affirmative duty to intercede when counsel's incompetence in throwing away every defense should be readily apparent and whether the hearing officer's failure to so intercede is a denial of due process of law?

III. Whether a hearing officer's failure to reopen a hearing during which a party had no opportunity to cross-examine an opposing witness, to call further witnesses, to offer evidence in his defense, or to make a statement by way of mitigation, prevents a full and fair hearing as required by due process of law?

IV. Whether employment of the substantial evidence rule as a shield against review of administrative action works a denial of due process of law?

## STATUTES INVOLVED

1. California Constitution, Article XX, §§22, provides, in relevant part:

> "The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the... continuance of such license would be contrary to public welfare or morals, or that a person...holding a license has violated any law prohibiting conduct involving moral turpitude....
>
> When any person aggrieved thereby appeals from a decision of the department...revoking any license for the...sale of alcoholic

beverages, the board shall review the decision....

In such cases, the board shall not receive evidence in addition to that considered by the department. Review by the board of a decision of the department shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record.... Orders of the board shall be subject to judicial review upon petition of the director or any party aggrieved by such order."

2. Business and Professions Code §§24200 provides, in relevant part:

"The following are the grounds which constitute a basis for the suspension of the revocation of licenses:

(a) When the continuance of a license would be contrary to public welfare or morals....

(b) ...the violation or the causing or the permitting of a violation by a licensee... [of] any rules of the board... or any rules of the department...or any other penal provisions of law of this State prohibiting or regulating the sale, exposing for sale, use, possession, giving away...of alcoholic beverages or intoxicating liquors."

3. Business and Professions Code §§24200.5(b) provides that the Department shall revoke a license:

"If the licensee has employed or permitted any persons to solicit or encourage others, directly or indirectly, to buy them drinks in the licensed premises under any commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy."

4. Business and Professions Code §25657 provides it to be unlawful:

"(a) For any person to employ, upon any licensed on-sale premises, any hostess or entertainer for the purpose of procuring or encouraging the purchase or sale of

alcoholic beverages, or to pay any such hostess or entertainer a percentage or commission on the sale of alcoholic beverages for procuring or encouraging the purchase or sale of alcoholic beverages on such premises.

(b) In any place of business where alcoholic beverages are sold to be consumed upon the premises, to employ or knowingly permit anyone to loiter in or about said premises for the purpose of begging or soliciting any patron or customer of, or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting."

5. Penal Code §303a provides:

"It shall be unlawful, in any place of business where alcoholic beverages are sold to be consumed upon the premises, for any person to loiter in or about said premises for the purpose of begging or soliciting any patron or customer of, or visitor in, such premises to purchase any alcoholic beverage for the one begging or soliciting."

6. Admin. Code, Title IV, Rule 143 provides:

"No on-sale retail licensee shall permit any female employee of such licensee to solicit, in or upon the licensed premises, the purchase or sale of any alcoholic beverage, any part of which is for, or intended for, the consumption or use of such female employee, or to permit any female employee of such licensee to accept, in or upon the licensed premises, any alcoholic beverage which has been purchased or sold there, any part of which beverage is for, or intended for, the consumption or use of any female employee."

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STATEMENT

This case involves an administrative action revoking Petitioner's on-sale general license issued by the Department. The action was initiated when the Department, on May 22, 1969, caused an accusation to issue against Petitioner stating facts upon which it sought suspension or revocation of Petitioner's license pursuant to the

provisions of California Constitution, Art. XX, §§22; B.& P. Code §§24200(a)(b), 24200.5(b), 25657; Pen. Code §303a; and Admin. Code, Title IV, Rule 143 (Hearing Transcript, pages 1-5, hereinafter referred to as H.T. 1-5). Petitioner subsequently filed his notice of defense and the matter was set for hearing on November 4, 1969.

The hearing was held as scheduled on November 4 before a hearing officer of the Office of Administrative Procedure. Petitioner was represented by his counsel, Mr. R. Jay Engel. At the hearing the Department called one witness, Mr. William F. Moss, a special investigator employed by the Department. (H.T. 11). Under direct examination, Investigator Moss testified that he and another investigator had visited Petitioner's premises on several occasions during which time they had been requested by several female employees to purchase alcoholic beverages for the employees' consumption. (H.T. 11-36).

Following the conclusion of the Department's direct examination, and prior to any cross-examination, Mr. Engel, Petitioner's counsel, entered into a stipulation with counsel for the Department regarding the receipt of certain evidence. (H.T. 36-39). Mr. Engel stipulated that in each count of the accusation the beverage alleged was in fact an alcoholic beverage. (H.T. 37). Mr. Engel further stipulated that all of the remaining factual matters stated in the accusation would be supported by the testimony of Investigator Moss and by the Report of Investigations offered by the Department. (H.T. 38-39). The Department thereupon rested. (H.T. 40).

Mr. Engel did not cross-examine the witness, called no further witnesses, offered no evidence on behalf of Petitioner, and made no statement by way of mitigation.

(H.T. 40-41). He apparently intended to argue that as a matter of law the Department had not sustained its burden of presenting a prima facie case. For this reason he allowed the matter to stand upon the submission of his Memorandum in Support of Dismissal of Accusation (H.T. 40) which was thereafter filed with the hearing officer on November 18, 1969.

There is little doubt that under California law the facts to which Mr. Engel stipulated will support a finding of at least one alleged violation, any of which would support a revocation decision. It seems obvious that Mr. Engel labored under a gross mistake of law fundamental to Petitioner's defense and that by resting upon the stipulation threw away Petitioner's entire defense.

Petitioner's testimony (H.T. 47-51) clearly disclosed his lack of knowledge of the legal effect of resting his case upon the stipulation. He had placed the entire defense in the hands of Mr. Engel, whose incompetence he could not be expected to have discovered until it was too late.

On November 10, 1969, Petitioner discharged Mr. Engel and engaged Mr. Rudolph A. Hoffman to represent him. (H.T. 42). Mr. Hoffman petitioned the hearing officer to reopen the matter and to set aside the stipulation entered into by Mr. Engel so that a full hearing on the merits of the case would be possible (H.T. 42). On December 4, 1969, the hearing officer denied this motion to reopen the hearing.

It seems manifestly unfair to permit a hearing officer to sit idly by and watch counsel, whose incompetence must have been apparent, throw away Petitioner's entire defense. The hearing officer must have known that the stipulated evidence was sufficient to establish an alleged

violation giving grounds to revoke Petitioner's license and that, because of the substantial evidence rule, his decision could be affirmed on appeal. The employment of such a procedure to deny a full hearing on the merits of the case seems fundamentally unfair. This Court has recognized that "...it is procedure that marks much of the difference between rule by law and rule by fiat." Wisconsin v. Constantineau, ___ U.S. ___, 91 S. Ct. 507, 509 (1971). The procedure employed herein seems more akin to rule by administrative fiat than to rule by law. It would seem unwise to allow such a procedure to become established precedent.

Today, administrative rather than judicial proceedings increasingly are employed to provide the forum in which the status of valuable rights are determined. In California, Gov. Code §§11500-11528 set forth the procedure to be used in the administrative adjudication of contested claims. Where, as here, the adjudication concerns the revocation of a license, the licensee is entitled to a hearing. B.& P. Code §24300. At the hearing, the licensee is entitled to present evidence, and is further entitled to call and examine witnesses, introduce exhibits, cross-examine opposing witnesses, impeach witnesses, and rebut the evidence against him. Gov. Code §11513. Further, even if the licensee does not file a notice of defense, he may file a statement by way of mitigation. Gov. Code §11506.

The obvious intent of these code provisions, especially where a business license may be revoked, is to inure to the parties a full and fair opportunity to present facts before an impartial arbiter, i.e., to provide a full and fair hearing as required by the due process clause of the Fourteenth Amendment to the Federal Constitution. See, Ideal Farms, Inc. v. Benson, 181 F. Supp. 62, 69 (D.N.J. 1960),

affirmed 288 F. 2d 608 (3rd Cir. 1961), cert. den. 372 U.S. 965 (1963). Petitioner respectfully urges that to date he has received neither a full nor a fair hearing of the matter herein involved.

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## REASONS FOR GRANTING CERTIORARI

### I. THE STIPULATION OF NOVEMBER 4 RESTED UPON COUNSEL'S GROSS MISTAKE OF LAW WHICH PREVENTED A FULL AND FAIR HEARING AS REQUIRED BY DUE PROCESS OF LAW.

The stipulation which was entered into by Mr. Engel, Petitioner's counsel, at the hearing of November 4, 1969 (H.T. 37-39), clearly was predicated on counsel's gross misunderstanding of applicable California law. Where counsel's conduct is so incompetent as to make a farce of a hearing administrative action should not be permitted to stand on the results of that hearing. Dodd v. United States, 321 F. 2d 240, 243 (9th Cir. 1963); Jenkins v. United States, 399 F. 2d 981, 982 (D.C. Cir. 1968); Carlisle v. United States, 352 F. 2d 716 (D.C. Cir. 1965); Dillon v. United States, 307 F. 2d 445, 449 (9th Cir. 1962).

The record, as a whole, clearly shows that Mr. Engel mistakenly believed California law to require at least Petitioner's scienter as a necessary element of the alleged violations. Based on his gross mistake of law, Mr. Engel, after the Department had called one witness (H.T. 11-36) entered into a stipulation with regard to the receipt of certain evidence (H.T. 36-39). The Department thereupon rested. (H.T. 40). Mr. Engel did not cross-examine the witness, called no further witnesses, offered no evidence in Petitioner's defense, and made no statement by way of

mitigation. (H.T. 40-41). Obviously, Mr. Engel, because of his gross mistake of law, labored under the incorrect belief that the Department, as a matter of law, had not sustained its burden of presenting a prima facie case. See, Memorandum In Support of Dismissal of Accusation, November 17, 1969.

This much, Respondents concede. See, Department's Brief at 2, l. 13, October 6, 1970; The Alcoholic Beverages Control Appeals Board of the State of California, Decision at 9, December 30, 1970; Memorandum of Points and Authorities in Opposition to Petition for Hearing at 2, March 2, 1971.

"...[I]t is basic to due process that an accused person have a fair opportunity to tell his story in a fair trial." MacKenna v. Ellis, 280 F. 2d 592, 595 (5th Cir. 1960). In the instant case, because of his attorney's gross mistake of law, Petitioner had no opportunity to present his story at a full hearing as required by due process of law. Poe v. United States, 233 F. Supp. 173 (A.D.C. 1964), affirmed, 352 F. 2d 639 (D.C. Cir. 1965). Petitioner was precluded from presenting any defense, a fundamental right, because of his counsel's incompetence.

Petitioner's testimony (H.T. 47-51) clearly disclosed his lack of knowledge of the effect of the stipulation into which his attorney had entered. Petitioner had placed the entire defense in the hands of Mr. Engel. There was no explanation by Mr. Engel of the legal effect of resting upon that stipulation. (H.T. 47-48). Neither was there explanation offered by the Department's counsel (H.T. 48), nor by the hearing officer (H.T. 48). See, Jenkins v. United States, supra.

Petitioner does not argue denial of due process of law because of some mere negligence on the part of counsel. Cf. Bottiglio v. United States, 431 F. 2d 930 (1st Cir. 1970)

(no denial of due process because of counsel's mere failure to make a timely motion); Stanley v. United States, 239 F. 2d 765 (9th Cir. 1957) (no denial of due process because of counsel's mere failure or refusal to make certain objections.) Nor does Petitioner argue a denial of due process of law merely because counsel might have more effectively taken a different approach. See, Kruchten v. Eyman, 406 F. 2d 304, 312 (9th Cir. 1969); Johnson v. United States, 380 F. 2d 810 812 (10th Cir. 1967). See also, Washington v. United States, 297 F. 2d 342 (9th Cir. 1962), cert. den., 370 U.S. 949 (1962). In short, Petitioner does not argue mere error in judgment on the part of counsel. Rather, Petitioner respectfully urges that he was precluded from receiving a full and fair hearing by the gross incompetence of counsel in not understanding even the fundamental law basic to his case. Petitioner respectfully asks this Court to decide whether his fundamental rights inherent to a full and fair hearing are to be thrown away because of counsel's incompetence.

Even though many of the principles herein were formulated first with regard to criminal trials, they seem no less persuasive here where Petitioner has received, in effect, an economic death sentence without having had a full hearing on the merits. See, Admin. Code, Title IV, Rule 57.6 (states Department policy not to allow a person to perform any of the activities ascribed to managership in Rule 57.5, Id., who does not possess the qualifications of a holder of an on-sale license); Id., Rule 66 ("No license shall be issued for premises...at which a license has been revoked, for reasons pertaining to the premises, unless one year has elapsed from the date the order becomes final...."). In view of Department policy not to grant licenses to persons who have had licenses revoked, Rule 57.6 would operate to

bar Petitioner from this entire field of employment.

II. THE HEARING OFFICER HAD AN AFFIRMATIVE DUTY TO INTERCEDE WHEN COUNSEL'S INCOMPETENCE SHOULD HAVE BEEN OBVIOUS, AND HIS FAILURE TO DO SO WAS A DENIAL OF DUE PROCESS OF LAW.

Currently, there is a rule developing in the lower Federal Courts that the hearing examiner in an administrative proceeding has a duty to act not as a mere umpire, but affirmatively, to make certain that all relevant facts are developed. Jenkins v. Gardner, 430 F. 2d 243, 290-291 (6th Cir. 1970) (dissenting opinion); Stewart v. Cohn, 309 F. Supp. 949, 956 (E.D. N.Y. 1970); Coyle v. Gardner, 298 F. Supp. 609, 611-615 (D. Hawaii 1969).

In its opinion, the Appeals Board below reasoned that Petitioner should have no relief "...from the not uncommon stipulations entered into by his counsel at the department hearing." The Alcoholic Beverages Control Appeals Board of the State of California, Decision at 9-10, December 30, 1970. However, while it may not be uncommon to stipulate to certain matters during an administrative proceeding, it would seem a rather uncommon practice to file a notice of defense, enter into a hearing, and then stipulate away that entire defense for which the hearing was called in the first place. Rather, it seems more reasonable that counsel rested upon the stipulation, thus foreclosing any possibility of a full and fair hearing on the merits, because of his incompetence. Petitioner respectfully requests a determination by this Court of whether a hearing officer, who must be assumed to be familiar with the applicable law, may sit idly by where it would be obvious to anyone familiar with the applicable law that counsel, because of his gross incompetence,

is throwing away the entire defense.

To state the matter another way, it is obvious that Petitioner did not intend to plead "guilty" to the accusation. Rather, he filed a notice of defense and requested a full hearing. However, the stipulation entered into by counsel had the effect of an admission to elements sufficient to sustain the administrative action, i.e., revocation. Thus, the effect was to enter a plea of "guilty" to the accusation, the very thing Petitioner had no intention of doing.

Before a plea of guilty can be valid, an accused must be apprised of its consequences. James v. United States, 388 F. 2d 453, 456 (5th Cir. 1968). He must know that by his plea he is waiving fundamental rights. Boykin v. Alabama, 395 U.S. 238 (1969). The reasoning that an accused must possess an understanding of the law in relation to the facts is persuasive. See, McCarthy v. United States, 394 U.S. 459 (1969). In the present case, Petitioner's testimony (H.T. 47-51) clearly disclosed his lack of knowledge of the effects of the stipulation entered into by his attorney. Petitioner, therefore, respectfully asks this Court to determine whether a hearing officer has an affirmative duty to inquire into Petitioner's knowledge where, as here, upon revocation he is thereafter precluded from his occupation from which he derives his livelihood.

Even though the currently evolving rule in the Jenkins, Stewart, and Coyle cases, supra, was formulated in a context where a party appeared without counsel at an administrative hearing, it would seem no less applicable here where Petitioner was represented by counsel whose incompetence must have been apparent to the hearing officer. In fact, the rule may have even greater applicability since a party can be

expected to rely on counsel's competence. In Petitioner's words, "my attorney was my attorney, and I felt any decisions he made was all right with me." (H.T. 50:22-23).

The fact that no objection was made by Petitioner at the time of the stipulation (The Alcoholic Beverages Control Appeals Board of the State of California, Decision at 10) should have no effect on the duty of the hearing officer:

> "It is no answer to presume that an accused defendant acquiesces in the errors of his retained counsel unless he notifies the trial court that he is not acquiescing therein; the average defendant would be unlikely to discover his lawyer's inadequacies until it is too late to notify the court. United States ex rel. Maselli v. Reinche, 383 F. 2d 129, 133 (2nd Cir. 1967)."

III. THE HEARING OFFICER'S FAILURE TO REOPEN THE HEARING OF NOVEMBER 4 PREVENTED A FULL AND FAIR HEARING AS REQUIRED BY DUE PROCESS OF LAW.

Petitioner's new counsel, Mr. Hoffman (H.T. 42), moved to reopen the November 4 hearing (H.T. 42-59) since the result of prior counsel resting on the stipulation of November 4 had been to foreclose any defense of the entire case. Petitioner had had no full hearing on the merits. This motion was denied on December 4, 1969.

Due process of law requires a full and fair hearing at some time or stage in an administrative proceeding before a determination can be made final and irrevocable or before it works a deprivation of life, liberty or property. United States v. Marietta Mfg. Co., Inc., 268 F. Supp. 176, 181 (S.D. W.Va. 1967).

In an opinion by Mr. Justice Brandeis, this Court has held: "A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument,

a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken." The New England Divisions Case, 261 U.S. 184, 200 (1923); Boston and Maine R.R. v. United States, 208 F. Supp. 661, 669 (D. Mass. 1962), affirmed 371 U.S. 26 (1962).

The step asked to be taken by the Department is revocation of Petitioner's business license. However, to this time, ample opportunity has not been afforded Petitioner to establish, by evidence and argument, the impropriety of revocation.

Administrative orders, quasi-judicial in character, are void if the hearing which was granted was inadequate or manifestly unfair. I.C.C. v. Louis. & Nash. R.R., 227 U.S. 88 (1913). Here, Petitioner, because of the incompetence of counsel at the November 4 hearing, had no opportunity to cross-examine the Department's witness, to call further witnesses, to offer evidence, or to make a statement by way of mitigation. (H.T. 40-41). Petitioner respectfully asks this Court to determine whether a hearing such as the one of November 4 is inadequate or manifestly unfair.

Assuming, arguendo, that the Department could prove the alleged violations at a full and fair hearing in which Petitioner is afforded his fundamental rights, Petitioner still has not had ample opportunity to show mitigating circumstances under applicable state law. Such an opportunity is basic to a full and fair hearing. "Facts and circumstances which ought to be considered must not be excluded." Morgan v. United States, 298 U.S. 468, 480 (1936).

Even by assuming, arguendo, that the Department could prove the alleged violations, the fact is that in cases where violations of the sections herein involved have

been found, revocation of a license, instead of suspension, has been ordered only where there was reliable evidence that the licensee knew of the charged violations. See, Chosick v. Reilly, 125 Cal. App. 2d 334, 270 P. 2d 547 (1954); Cornell v. Reilly, 127 Cal. App. 2d 178, 273 P. 2d 572 (1954); Hobson v. Reilly, 132 Cal. App. 2d 275, 281 P. 2d 877 (1955); Cooper v. State Board of Equalization, 137 Cal. App. 2d 672, 290 P. 2d 914 (1955). Cf., Reimel v. Alcoholic Beverage Control Appeals Board, 252 Cal. App. 2d 520, 60 Cal. Rptr. 641 (1967). However, to date, Petitioner still has not had ample opportunity to show, by way of mitigation, his lack of knowledge.

It readily can be seen, under applicable state law, that such mitigating circumstances are a very significant factor, particularly since Petitioner has owned a license since June 8, 1967, and in the three succeeding years, had had no disciplinary record whatsoever. Mitigating circumstances alone, under state law, could mean the difference between revocation and mere suspension. Petitioner, therefore, respectfully urges this Court to determine whether the hearing officer's refusal to reopen the November 4 hearing was manifestly unfair and denied Petitioner ample opportunity to establish the impropriety of revocation of his license.

## IV. EMPLOYMENT OF THE SUBSTANTIAL EVIDENCE RULE AS A SHIELD AGAINST REVIEW OF DEPARTMENT ACTION IS A DENIAL OF DUE PROCESS OF LAW.

Review by the Appeals Board of the Department's revocation order, so far as it is relevant herein, was limited to two determinations:

1) Whether the order of the Department was supported by its findings, and

2) Whether the findings of the hearing officer

were supported by substantial evidence. Cal Const., Art. XX, §22. Judicial review of the decision of the Appeals Board, had it been granted, would have been limited to a determination of whether the order was supported by substantial evidence. Code of Civil Procedure §1094.5(c); Mundell v. Depart. Alcoholic Beverage Control, 211 Cal. App. 2d 231, 233, 27 Cal. Rptr. 62 (1962). See also, Ishimatsu v. Regents of University of California, 266 Cal. App. 2d 854, 72 Cal. Rptr. 756 (1968).

In its decision, the Appeals Board found "...that the record contains substantial evidence supportive of the department's findings and that the findings support the department's decision." The Alcoholic Beverage Control Appeals Board of the State of California, Decision at 11, December 30, 1970. The State appellate courts below denied a hearing of the matter.

Petitioner does not even suggest that the substantial evidence rule is per se unconstitutional. In addition, there is little doubt that under California law, the facts to which Mr. Engel stipulated at the November 4 hearing will support a finding of at least one alleged violation, any of which would support a revocation decision. However, such a revocation-minded finding can be reached only by dismissing all other considerations, including the effects of counsel's gross incompetence, the refusal of the hearing officer to intercede or to reopen the hearing, as well as the general equities which lie in the balance. It seems fundamental to due process of law that rules, conduct, and procedures which govern administrative action must be applied in such a way as to secure a just result. A strict application of the substantial evidence rule, with a predetermined gaze fixed on revocation, should not act as a shield by which to fend off judicial review.

"...[T]he requirements of due process frequently vary with the type of proceeding involved...." Hannah v. Larche, 363 U.S. 420, 440 (1960). The type of proceeding herein involves the revocation of Petitioner's business license to which attach the severe disabilities discussed, supra. To permit the Appeals Board to employ the substantial evidence rule to shield its revocation decision against all other considerations seems unduly revocation-minded. Such a procedure would seem to offend "the rudiments of fair play." See, Chicago, M., & St. P. R.R. Co. v. Polt, 232 U.S. 165, 168 (1914).

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## CONCLUSION

Petitioner herein has had his business license ordered to be revoked. In addition, because of the personal disabilities which will attach to him if revocation occurs, he will be, for all practical purposes, thereafter precluded from his occupation from which he derives his livelihood.

To this day, Petitioner, because of the gross incompetence of his former attorney, has never had a full and fair hearing on the merits of his case. He has never been provided an opportunity to cross-examine the Department's witness, to call further witnesses, to offer evidence, or to make a statement by way of mitigation. It should not be heard that the hearing officer did not realize the effect of counsel resting upon his stipulation. Yet the hearing officer sat idly by to watch counsel's incompetence throw away the entire defense of the unwary Petitioner. Then on appeal the substantial evidence rule was thrown up as a shield to defend the revocation order thus obtained.

"Due process of law requires a balancing

> process. The precise nature of the interest alleged to be adversely affected...the manner in which this is to be done and the reasons for doing it, the balance of individual hurt and the justifying public good -- these and such like are the considerations, avowed or implicit, that determine the judicial judgment, when appeal is made to 'due process.'" Hannah v. Larche, 363 U.S. 420, 487-488 (1960) (Frankfurter, J., concurring).

Petitioner herein desires only that he be given ample opportunity at a full and fair hearing on the merits of his case to establish the impropriety of revocation of his business license. It is difficult to conceive of any substantial reason, in the balance, why the hearing of November 4 should not be reopened and the stipulation entered into by counsel be stricken.

To date, Petitioner has had no full and fair hearing. Revocation of his business license prior to such a hearing would be a deprivation of due process of law. Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969); Goldberg v. Kelly, 397 U.S. 254 (1970).

For the reasons stated herein, this Honorable Court should grant the Petition for Writ of Certiorari sought by Petitioner, Max Lipkin.

DATED: April 12, 1971

Respectfully submitted,

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